

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-303

ERIC JESSEE

APPELLANT

FINAL ORDER
SUSTAINING HEARING OFFICER'S
VS. FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER AS ALTERED

FINANCE AND ADMINISTRATION CABINET

APPELLEE

*** **

The Board at its regular March 2016 meeting having considered the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer dated December 22, 2015, and being duly advised,

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be altered as follows:

A. **Delete** Conclusion of Law number 8 and substitute the following:

8. The evidence clearly showed that Mr. Jessee and Mr. Doss were hired and working in the same class and in the same county. The deciding question is whether Mr. Jessee had a "similar combination of education and experience relating to the job classification" as Mr. Doss. Although the one- year standard used by this Cabinet may vary from standards used by other Cabinets, it was not unreasonable for Appellee to have used such standard as they have used it consistently over a period of several years.

B. **Delete** Conclusions of Law numbers 14, 15 and 16:

IT IS HEREBY ORDERED that the Findings of Fact, Conclusions of Law and Recommended Order of the Hearing Officer be, and they hereby are approved, adopted and incorporated herein by reference as a part of this Order, and the Appellant's appeal is therefore **DISMISSED**.

The parties shall take notice that this Order may be appealed to the Franklin Circuit Court in accordance with KRS 13B.140 and KRS 18A.100.

SO ORDERED this 16th day of March, 2016.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK, SECRETARY

A copy hereof this day mailed to:

Hon. Katherine Fitzpatrick
Eric Jessee

COMMONWEALTH OF KENTUCKY
PERSONNEL BOARD
APPEAL NO. 2014-303

ERIC JESSEE

APPELLANT

VS.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND RECOMMENDED ORDER**

FINANCE AND ADMINISTRATION CABINET

APPELLEE

** ** ** ** **

This matter came on for an evidentiary hearing on October 26, 2015, at 9:30 a.m., at 28 Fountain Place, Frankfort, Kentucky, before the Hon. Roland P. Merkel, Hearing Officer. The proceedings were recorded by audio/video equipment and were authorized by virtue of KRS Chapter 18A.

Appellant, Eric Jessee, was present and not represented by legal counsel. Appellee, Finance and Administration Cabinet, was present and represented by the Hon. Katherine Fitzpatrick. Also present as Agency representative was Ms. Honor Barker.

The first issue in this case involves whether or not the Appellant was entitled to a salary increase pursuant to 101 KAR 2:034, effective upon the hiring of Bobby Doss on July 16, 2007. The burden of proof is on the Appellant to show such entitlement by a preponderance of the evidence.

The second issue pertains to Appellee's contention regarding the timeliness of the filing of Appellant's appeal. The burden of proof on this issue is on the Appellee to prove its case by a preponderance of the evidence. Appellee presented an objection stating the original grievance related to a denial of a desk audit and that the issue had morphed after a mediation session to whether or not Appellant was entitled to a salary increase upon the hiring of Bobby Doss. The Cabinet believed this subsequent issue was completely different from what was originally filed in the appeal, and therefore objected to going forward. The Hearing Officer noted that under KRS Chapter 13B, the purpose of a pre-hearing conference is to narrow the issues involved in the case and that the prior Hearing Officer had correctly done so and given proper notice to all parties of the existence of this issue. Appellee's objection was **OVERRULED**.

The rule separating witnesses was invoked and employed throughout the course of the proceeding. Each party presented their respective opening statement.

BACKGROUND

1. The first witness for the Appellant was the Appellant, **Eric Jessee**. Mr. Jessee has been employed by the Finance and Administration Cabinet since March 1, 1999. He currently holds the position of Mechanical Maintenance and Operations Supervisor in the Department for Facilities and Support Services, Division of Mechanical Services.

2. Approximately a year and a half ago, Mr. Jessee examined his paycheck and thought he ought to be earning more. He requested a desk audit to see if he was entitled to a pay increase. This request by e-mail (Appellant's Exhibit 1) stated:

I would like to request a desk audit. I do not believe my pay scale is comparable to current hire for my class. Thank you.

The e-mail had been sent to Scott Parritt, with a "cc" to Appellant's supervisor, Randal Bohannon.

Bobby Doss had been hired to a position in Franklin County in the same classification as the Appellant on July 16, 2007.

3. Having not received a suitable response to his desk audit request, Appellant filed a grievance on August 29, 2014. In that grievance he stated, "My pay scale is not comparable to current hire for my class." The specific solution he requested was "adjust pay to current hire scale." (Appellee's Exhibit 3.)

4. His grievance was reviewed on three levels before it went on to the acting Assistant Director, the Executive Director, and the Commissioner. Not having received an amenable result, Appellant appealed the final decision. The Appointing Authority, Honor Barker reviewed the matter and by her letter of October 14, 2014, stated nothing could be done to increase his salary (Appellee's Exhibit 3).

5. Mr. Jessee conducted a salary search and compared his pay to those of other supervisors in his class. He found that he was paid about \$10,000 less than the next higher paid supervisor. He then conducted an open records request and obtained several documents. The P-1 for Bobby Doss (Appellant's Exhibit 2) showed Mr. Doss started employment at \$19.494 per hour and had been appointed to the same grade and in the same job and county as the Appellant. Mr. Doss had never had prior work experience in state government.

6. Appellant's Exhibit 3 is Mr. Doss' P-1 for the period of September 1, 2006, to September 1, 2007. At the time Doss was hired, Jessee earned \$15.243 dollars per hour. Under the open records request, Mr. Jessee also secured copies of four applications made by Bobby Doss: Appellant's Exhibit 4, showing receipt on May 1, 2000; Appellant's Exhibit 5, showing receipt on April 4, 2007; Appellant's Exhibit 6, showing receipt on June 18, 2007; and

Appellant's Exhibit 7, an undated typed application which was the latest document submitted by Mr. Doss.

7. Mr. Jessee identified Appellant's Exhibit 8 as his own most recent application tendered to the state.¹

8. Appellant graduated high school and for 9 months attended Technical School for Heating and Air Conditioning. He worked in the field for a while, and then worked in a factory. On March 1, 1999, he began employment with the state.

9. He took a test and obtained his HVAC Journeyman's license. He also was grandfathered in to receive his Master Electrician License. He had been performing supervisory duties for two years before Doss had been hired. From 1999 through 2007 he worked in the mechanical maintenance field and participated in several continuing education classes.

10. When Doss was hired, Appellant had at least ten years experience working in this area. He believed Doss and he had fairly close, similar amount, of experience.

11. He tendered and identified the following exhibits:

Appellant's Exhibit 12: April 26, 2001 letter from Experior confirming a passing score on the Journeyman HVAC Mechanic test;

Appellant's Exhibit 13: A July 9, 2004 letter from the Kentucky Environmental and Public Protection Cabinet, Electrical Licensing Section, certifying approval of Appellant for a Master Electrician license in the Commonwealth of Kentucky;

Appellant's Exhibit 14: A list of Appellant's Electrical Continuing Education Provider Maintenance course attendance from 2/19/2005 through 1/16/2015, showing 66 hours of course work;

Appellant's Exhibit 15: A Certificate of Completion for a two-day class in Infrared Thermal Imaging using the Fluke Ti30;

Appellant's Exhibit 16: A Certificate of Completion for the Compressor Troubleshooting Training;

Appellant's Exhibit 17: Record of Attendance for Continuing Education Credit;

Appellant's Exhibit 18: Record of Attendance for Continuing Education Credit;

¹ Appellant's Exhibits 9, 10, and 11 were not admitted into evidence per a ruling sustaining Appellee's objection.

Appellant's Exhibit 19: A March 11, 1999 letter certifying Appellant as a graduate from Universal Technical Institute, with completion of 1,080 clock hours and 51.5 credit hours in the Air Conditioning and Refrigeration Technology I program;

Appellant's Exhibit 20: A letter dated December 14, 2006, from the Department for Facilities and Support Services, advising Appellant of a transfer effective December 18, 2006, to the Capitol Annex complex. Mr. Jessee testified the Mechanical Maintenance and Operations supervision at that location was an extremely high profile position involving state buildings pertaining to the Governor's office, Legislature, Administrative Office of the Courts, and Legislative Research Commission. At that time he was promoted to manager.²

12. He identified Appellant's Exhibit 22 as a copy of the Administrative Regulation pertinent to his appeal herein: 101 KAR 2:034, Section 1(2). When Mr. Doss was hired, two other employees, Larry Skaggs and Ricky Hammond benefited from that regulation as their pay was increased to the level received by Doss.

13. He identified Appellant's Exhibit 25 as a Personnel Action Notification showing that effective January 1, 2015, he received a change in pay due to the salary of a new appointee, Michael Hammond.

14. He identified Appellant's Exhibit 26 as the P-1 statement showing his reclassification for purposes of increase in pay. Mr. Jessee testified he and Mr. Doss, at the time of Mr. Doss' hire, were in the same class and in the same work county, that being Franklin County. He acknowledged any relief he receives as a result of this current appeal, would be cut off at July 1, 2015, as that is the date he took the manager's job at a higher pay rate.

15. There were no further witnesses for the Appellant. The first witness for the Appellee was **Honor Barker**.

16. Ms. Barker, since May 2013, has been employed by the Finance and Administration Cabinet as Director of the Division of Human Resources. She is also an Appointing Authority for the Cabinet.

17. She first became aware of this matter when Mr. Jessee's grievance was forwarded to her level. He requested a desk audit and she recognized Appellant had claimed he was being paid less than others in his work, county and classification.

18. A desk audit is performed when an employee believes their job duties are more consistent with another job title. The more she and Appellant spoke, the more Appellant realized he was classified in the proper position and a desk audit was not applicable. He believed this

² Appellant's Exhibits 21, 23, and 24 were not admitted into evidence per a ruling sustaining Appellee's objection.

was strictly a pay issue. There was nothing to audit as that process would not have addressed his concern. Ms. Barker explained to Appellant there could be many reasons for a wage disparity for employees in the same classification and county.

19. Once it became clear to her that wage disparity was the issue, Ms. Barker told Appellant she would look at the file. She searched for documents that were in existence at the time of the initial evaluation when Doss was appointed. The woman who had performed that evaluation, Jackie Flynt, was no longer employed by the Agency. Barker found some documents and decided to perform her own evaluation.

20. Documents that existed at the time of Doss' hire included Mr. Jessee's application (Appellee's Exhibit 1). She gave him credit for all his time of employment with the Cabinet, as well as jobs he held prior to state employment. Appellant's licenses were not applicable for purposes of this review. She also reviewed Appellant's Exhibit 8, the application available at the time.

21. She examined the minimum requirements of the job specification, for qualification to that class. In this case the minimum requirements were graduation with a high school diploma and five years of experience in specific areas including heating, air conditioning, ventilation, etc. She determined what total experience Appellant and Doss each had and subtracted the five years minimum experience from each.

22. At the time of Mr. Doss' appointment, a review had been conducted for everyone in the same class in Franklin County who had a salary less than the level to which Doss had been hired. Four employees had more experience than Doss and, therefore, their salaries were raised to the same level as Doss.

23. In her review, she determined Doss to have had twelve years and ten months experience without consideration of his three years of military service. She testified all military service has some degree of maintenance experience. She determined Mr. Jessee had almost ten years, (closer to nine years and ten months) of experience. They both had the same amount of education. They both had licenses and certificates, but she did not consider those because they are not a part of the minimum requirements for the job.

24. Had she determined that some error had been committed in the original review, she would have had authority to recommend a change in salary.

25. While licenses and certificates are "pluses" in consideration of hiring someone, they are not a consideration when looking at mid-range salary. Such items would not have been included as part of a Personnel Cabinet review. No credits for those items were given in this process.

26. She acknowledged Appellant's employer paid for his training and licenses and would not have paid for same if it did not believe such training had relevance to performance of his job. For her evaluation purposes, however, the licenses and certificates were irrelevant.

27. She acknowledged Mr. Doss and Mr. Jessee were both employed in the same county and in the same classification. Subsequent to his appointment, Doss submitted a supplemental document evidencing self-employment experience. (Appellee's Exhibit 2.) That document apparently had not been considered in this current review.

28. Ms. Barker stated that her Cabinet standard is a one-year period. That means if an individual is within one-year of the appointed individual in education and experience, then such individual's salary will be adjusted to the level of the appointed individual. The Hearing Officer asked the rationale for using one year. Ms. Barker did not have an answer to that and stated it was just a policy explained to her; it is a standard the Cabinet had set years ago and has always utilized. That standard does not show up in the regulation. She acknowledged every agency has a different standard. "I do know that it varies widely."

29. The Hearing Officer inquired why such a varying standard among agencies should not be considered arbitrary. She answered, "Because it is consistent . . . the standard that's been used the entire time I've been there; the standard that, as has been explained to me, has been used since well before 2007."

30. She had no knowledge of anyone having explained the one-year standard to Mr. Jessee, prior to her having recently explained it to him. Mr. Jessee was not provided that information prior to his having filed the appeal with the Kentucky Personnel Board.

31. Whenever an individual is appointed to a position at a higher salary, such as Doss, a review is always conducted of other employee's salaries for those working in the same county and in the same classification, before the incoming individual is appointed. Individuals entitled to an adjustment are then notified. Individuals who do not receive an adjustment are not notified that the process had taken place.

32. Upon her review, she determined the original evaluation process appeared to have been used and applied properly at the time of Doss' hire. They concluded correctly that Mr. Jessee's salary should not be adjusted.

33. If the Cabinet were to change the standard now to allow reviews back to 2007, it would open the floodgates and the possible cost to the Cabinet could be astronomical.

34. She identified Appellee's Exhibit 3 as the entirety of the grievance packet filed by the Appellant.

35. Recently, Appellant received the benefit of an increase in salary due to the new hire of Michael Hammond. Appellant met the standard of being within one year of Hammond in education and experience (Appellant's Exhibit 25).

36. Currently, the Cabinet uses an electronic document that utilizes various formulae to review salary and make a determination. That document was not available or used in 2007. At that time a form was used that showed the individuals involved, which had manually inserted notes. At that time, those notes included notations about Mr. Jessee.

37. No further witnesses being brought forth, each party presented their respective closing arguments. The matter stood submitted to the Hearing Officer for his recommended order.

FINDINGS OF FACTS

1. Eric Jessee, the Appellant, is a classified employee with status. He is employed as Operations Manager in the Department for Facilities and Support Services, Division of Mechanical Services, by the Finance and Administration Cabinet.

2. On July 16, 2007, Bobby Doss had been hired to a position in Franklin County in the same classification and county as Appellant. Doss started employment at \$19.494 per hour, in the same grade, job, and county as Appellant. (Appellant's exhibit 2).

3. At the time Doss was hired, Appellant earned \$15.243 per hour.

4. At the time Doss was hired, 101 KAR 2:034 was in full force and effect. Under this regulation, and as a result of a comparative evaluation, two other employees, Larry Skaggs and Ricky Hammond, received pay increases. That evaluation resulted in Mr. Jessee not qualifying, under the one-year standard applied by the Cabinet, to a pay adjustment.

5. On January 1, 2015 Appellant received a pay increase under 101 KAR 2:034 due to the salary of Michael Hammond, a new appointee (Appellant's Exhibit 25).

6. On July 1, 2015 Appellant was reclassified and received a corresponding increase in salary (Appellant's Exhibit 26).

7. Honor Barker, Director of the Division of Human Resources for Finance and Administration Cabinet, researched available documents pertinent to Appellant's claim of a wage disparity. She performed her own evaluation of the matter. She found that at the time Doss was appointed, four employees in Franklin County who had more experience than Doss received an increase in salary to the same level as Doss. Appellant's salary was not raised at that time.

8. She found Doss had twelve years and ten months experience, while Appellant had almost ten years' experience; both had the same amount of education. While they both possessed licenses and certificates, she did not consider these as they were not part of the job's minimum requirements. She considered them irrelevant for purposes of this review.

9. The Finance and Administration Cabinet, in conducting such comparative reviews, uses a one-year period as a standard: if an employee in the same classification and county has total education and experience within one year of the new appointee, such employee's salary will be adjusted. There was no evidence of a rationale, for use of a one-year standard by this Cabinet. Furthermore, Ms. Barker testified every agency uses a different standard under that regulation. She testified "I do know that it varies widely."

10. Ms. Barker concluded that the review process had been properly employed at the time Doss was appointed and that Appellant should not receive an adjustment in salary.

11. Mr. Jessee filed his appeal with the Kentucky Personnel Board in a timely manner.

CONCLUSIONS OF LAW

1. There are two issues in this case: (A) whether or not the Appellant, Eric Jessee, was entitled to a salary increase pursuant to 101 KAR 2:034, effective upon the hiring of Bobby Doss on July 16, 2007, and (B) Appellee, Finance and Administration Cabinet's contention that the appeal filed with the Kentucky Personnel Board was untimely. The burden of proof on the first issue was on the Appellant to show such entitlement by preponderance of the evidence. The burden of proof on the second issue was on the Appellee to prove its case by preponderance of the evidence.

2. Eric Jessee is a classified employee with status. A classified employee with status may not be demoted or otherwise penalized except for cause. KRS 18A.095 (1).

3. A "penalization" includes, but is not limited to, demotion in any action that diminishes the level, rank, discretion or responsibility of an employee without proper cause; and the abridgement or denial of other rights granted to state employees. KRS 18A.005 (24).

4. "Preponderance of evidence" means; "...evidence, which as a whole, shows that the facts sought to be proved is more probable than not. With respect to burden of proof in civil actions means greater weight of evidence, or evidence which is more creditable and convincing to the mind." Black's Law Dictionary, 5th edition, page 1064. The ultimate burden of persuasion in all administrative hearings is met by a preponderance of the evidence in the record. Failure to meet the burden of proof is grounds for a recommended order from the Hearing Officer. KRS13B.090 (7).

5. On July 16, 2007 Appellant held the position of Mechanical Maintenance and Operations Supervisor, with a work station in Franklin County. On that date Bobby Doss was hired to a position as Mechanical Maintenance and Operations Supervisor in Franklin County.

6. 101 KAR 2:034, Sec 1, states:

“New Appointments. (1) An appointing authority shall appoint at a salary not to exceed the midpoint of the pay grade.

The appointing authority shall adjust to that salary an employee who is earning less than the new appointees salary, if the appointing authority determines that the incumbent employee:

- a. is in the same class;
- b. is in the same work county; and
- c. has a similar combination of education and experience relating to the job classification.”

7. At the time of Doss’ hire, the Cabinet conducted a comparative evaluation of incumbent employees. The Cabinet’s own standard for determining whether an incumbent employee has a similar combination of education and experience relating to the job classification, involves a determination whether such incumbent employee has a combination of education and experience that differs no more than one year from that possessed by the new employee. Under the comparative evaluation performed at that time, four incumbent employees, other than the Appellant, received an increase in their salaries.

8. The evidence clearly showed that Mr. Jessee and Mr. Doss were hired and working in the same class and in the same county. The deciding question is whether Mr. Jessee had a “similar combination of education and experience relating to the job classification” as Mr. Doss. Although the one year standard used by this Cabinet may vary from standards used by other Cabinets, it was not unreasonable for Appellee to have used such standard as they have used it consistently over a period of several years. The agency is entitled to deference in its interpretation and application of the regulation.

9. Mr. Doss graduated from high school and had 27 hours of junior college credits. (Appellants exhibit 7). Mr. Jessee graduated from high school and had 51 hours and a diploma from a technical institute (Appellants Exhibit 8).

Doss had twelve years and ten months experience, without consideration of his three years of military service.³ Mr. Jessee had been credited approximately ten years of experience. As such, Mr. Jessee fell outside the one year standard employed by the Cabinet.

³ Such calculation was conducted by Honor Barker where she determined the total years of experience and education as a whole for both the Appellant and Mr. Doss, and subtracted the five year minimum requirements for the job position.

10. Appellant failed to prove by a preponderance of the evidence that he was entitled to a salary adjustment pursuant to 101 KAR 2:034.

11. There is conflicting evidence whether Appellant did or did not have the right to file this appeal with the Kentucky Personnel Board at the time he chose to do so. Mr. Jessee first filed his grievance on August 29, 2014 (Appellee's Exhibit 3). That grievance went through several levels of review with the final supervisory review issued September 12, 2014.

12. On October 14, 2014, Honor Barker as Appointing Authority issued a letter to the Appellant advising him the relief he sought was not permissible and, therefore, relief was not warranted. He was further advised that he could appeal the matter to the Kentucky Personnel Board "within 60 days of the occurrence itself".

13. Mr. Jessee filed his appeal with the Kentucky Personnel Board on November 17, 2014. To complicate matters further, Appellant had been aware of the hire of Bobby Doss from and since July 16, 2007.

14. KRS18A.095 (29) states that when an employee has been penalized but not received written notice of his or her right to appeal, the employee shall file the appeal with the Kentucky Personnel Board within one year from the date of the penalization or from the date that the employee reasonably should have known of the penalization.

15. The Personnel Board may deny a hearing to an employee who has failed to file an appeal within the time proscribed by KRS18A.095, and may deny any appeal after a preliminary hearing if it lacks jurisdiction to grant relief. KRS18A.095 (18) (a).

16. The Kentucky Personnel Board at its Pre-Hearing Conference of August 27, 2015 accepted this appeal and set the matter for Evidentiary Hearing. It is apparent that the Personnel Board believed at the time of the Pre-Hearing conference that it had the jurisdiction to go forward with the matter and to hear this appeal. Furthermore, after having heard the evidence and determined Appellant failed to meet the burden of proof on his issue, the matter of the timeliness of the appeal would also be rendered moot.

RECOMMENDED ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Officer recommends to the Kentucky Personnel Board that the appeal of **ERIC JESSEE VS. FINANCE AND ADMINISTRATION CABINET (APPEAL NO. 2014-303)** be **DISMISSED**.

NOTICE OF EXCEPTION AND APPEAL RIGHTS

Pursuant to KRS 13.B.110(4), each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file exceptions to the Recommended Order with the Personnel Board. In addition, the Kentucky Personnel Board allows each party to file a response to any exceptions that are filed by the other party within five (5) days of the date on which the exceptions are filed with the Kentucky Personnel Board. 101 KAR 1:365, Section 8(1). Failure to file exceptions will result in preclusion of judicial review of those issues not specifically excepted to. On appeal, a circuit court will consider only the issues a party raised in written exceptions. See *Rapier v. Philpot*, 130 S.W.3d 560 (Ky. 2004).

The Personnel Board also provides that each party shall have fifteen (15) days from the date this Recommended Order is mailed within which to file a Request for Oral Argument with the Personnel Board. 101 KAR 1:365, Section 8(2).

Each Party has thirty (30) days after the date the Personnel Board issues a Final Order in which to appeal to the Franklin Circuit Court pursuant to KRS 13B.140 and KRS 18A.100.

ISSUED at the direction of **Hearing Officer Roland Merkel** this 22nd day of December, 2015.

KENTUCKY PERSONNEL BOARD



MARK A. SIPEK
EXECUTIVE DIRECTOR

A copy hereof this day mailed to:

Hon. Katherine Fitzpatrick
Eric Jessee